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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **475**

FRANK R. FRANKO, *Petitioner,*

v.

MAHONING COUNTY BAR ASSOCIATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

EUGENE GREEN
JOSEPH SCHIAVONI
Youngstown Terminal Bldg.
Youngstown, Ohio
Counsel for Petitioner

October 28, 1958.

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FRANK R. FRANKO, *Petitioner,*

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MAHONING COUNTY BAR ASSOCIATION, *Respondent:*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on May 28, 1958.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Ohio, dated May 28, 1958, is reported at 168 Ohio St. 17, 151 N. E. 2d 17, and is reprinted in the Appendix hereto, pp. 1a-25a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 28, 1958, and a timely application for rehearing was denied on July 2, 1958. On September 3, 1958, Mr. Justice Burton signed an order extending the time for filing this petition for writ of certiorari to and including October 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the validity of a Rule of Practice of the Supreme Court of Ohio (Rule XXVII) on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the Constitution of the United States outlaws a rule of practice, adopted by a state supreme court for use in state disbarment proceedings, whereby the tribunal that ultimately decides all factual issues and imposes the appropriate penalty is deprived, in a case where facts are in dispute and credibility of witnesses is decisive, of the findings of fact and recommendations of those who actually heard the conflicting testimony of the witnesses and who formed impressions as to the credibility and weight to be attached to that testimony.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to Constitution of the United States:

> No state shall . . . deprive any person of life, liberty, or property without due process of law . . .

Rule XXVII of the Supreme Court of Ohio:

* * *

(10) HEARING BY PANEL OF THREE COMMISSIONERS. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

* * *

(13) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF PANEL. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, indefinite suspension, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) REVIEW BY ENTIRE BOARD OF COMMISSIONERS; BOARD TO ADMINISTER PRIVATE REPRIMAND. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is

guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF BOARD AFTER REVIEW. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommenadtions, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

* * *

STATEMENT OF THE CASE

Petitioner assumed his duties as Judge of the Municipal Court of the City of Youngstown, Ohio, on January 2, 1954, having been duly elected to that position for a six-year term. He has discharged the duties of that office continuously since that date. R. 259-260. He was admitted to the practice of law in Ohio in 1945 and actively practiced for seven or eight years prior to becoming judge. R. 339.

Acting pursuant to the procedure established by Rule XXVII of the Supreme Court of Ohio, the respondent Mahoning County Bar Association on May 27, 1957, filed a complaint against petitioner with the seventeen-man Board of Commissioners on Grievances and Discipline.[1] The complaint (R. 6-10, 29-32) alleged that during the time the petitioner had held his judicial position he had violated the Canons of Judicial Ethics as adopted by the Supreme Court of Ohio on January 1, 1957, and that disciplinary action should be taken by the Board and the Supreme Court in accordance with Rule XXVII. The specific charges of misconduct against the petitioner all involved incidents occurring in 1956 prior to the adoption of Rule XXVII on January 1, 1957, and were specified as follows:

1. Petitioner was allegedly guilty of misconduct in judicial office in that he did not follow the mandate of a state statute (Ohio Rev. Code § 4507.15) by noting traffic offenses on the reverse side of the driver's licenses of motorists convicted in traffic court of traffic violations other than parking violations. This misconduct, it was alleged, was motivated by a desire to promote petitioner's political career. R. 6-7, 29.

2. Petitioner was allegedly guilty of further misconduct in office in that he did not resign his judicial office when he became an independent candidate for

[1] Section 1 of Rule XXVII provides that the Board of Commissioners is created as Commissioners of the Supreme Court of Ohio with power to receive, entertain, inquire into, take proofs, make findings and submit recommendations to the Supreme Court concerning, *inter alia*, "complaints of misconduct as hereinafter defined which are alleged to have been committed by any attorney or counselor at law or judge."

the office of Prosecuting Attorney of Mahoning County, Ohio, at the general election in November of 1956. It was also alleged that he "used the power, prestige and the influence of his judicial position to promote his candidacy." R. 7, 30.

3. Additional misconduct in office was charged in that petitioner "nullified and voided parking violation charges involving the illegal parking of his own automobile" between April 4, 1956, and November 5, 1956, the period of his campaign for the office of Prosecutor. R. 9, 32.

4. A fourth charge of misconduct was added, over petitioner's strenuous objections (R. 261-270), during the course of the hearings before the three-member panel of the Board. This amendment charged that petitioner, as judge, issued a subpoena in a particular traffic case (involving one George Chappel) during the month of June, 1956, when he knew that the witness was out of the state. The witness was a member of the police force and had been the subject of newspaper publicity in connection with his absence from the city. It was alleged that petitioner issued the summons not to obtain testimony but to secure favorable newspaper publicity for himself in his campaign for the office of Prosecutor. R. 8, 30-31.

Petitioner filed an answer to the complaint, denying each count. R. 11, 38-39. The answer further claimed that the proceedings "are without legality" and asserted that the proceedings had been instituted for political rather than disciplinary purposes. R. 11, 39.

A hearing on the issues thus raised was held before a three-member panel of the Board on July 29, 30 and 31, 1957. R. 17-502. In accordance with Section 10 of

Rule XXVII, the Hearing Panel consisted of three Commissioners, no one of whom was a resident of the Youngstown district or area.

The testimony presented at the hearing, which was made public at petitioner's request, was sharply conflicting and many of the conclusions to be reached depended upon the weight and credibility to be given to the testimony of the various witnesses. Petitioner made numerous legal and evidentiary objections, most of which were taken under advisement and never formally resolved. One objection that was denied on the record, however, was petitioner's complaint (R. 57) that it was beyond the province of the panel to inquire into the charges insofar as they involved acts of judicial discretion by petitioner in his capacity as a judge. R. 66. Petitioner's counsel renewed this objection in the closing oral argument to the panel. R. 486.

At the close of the hearing, the chairman of the panel announced (R. 501) that the panel would "take the matter under consideration, as provided by Rule XXVII, and we will report the decision, the decision and the recommendation." A brief was thereafter filed by petitioner with the panel, with enough copies supplied for distribution to the entire seventeen members of the Board of Commissioners on Grievances and Discipline.

Under Section 13 of Rule XXVII, if the panel determined that petitioner was guilty of misconduct and that a public reprimand, indefinite suspension or permanent disbarment was merited, the panel was obligated to "make its certified report of the proceedings before it, including its findings of fact and recommendations, and . . . file the same, together with the transcript of testimony taken . . . with the Secre-

tary of the Board of Commissioners." But no provision is made in Rule XXVII for revealing to the individual involved the panel's findings and recommendations. And no such revelation was in fact made to the petitioner in this case. Those findings and recomendations must have been adverse, however, for otherwise the full Board would not have had occasion to consider the matter as it did pursuant to Section 14 of Rule XXVII.

Under Section 14, once the panel rendered adverse findings and recommendations, the full Board had discretion (1) to send the matter back to the panel for further hearing, (2) to order a further hearing before the full Board, or (3) to proceed upon the certified report of the prior proceedings before the panel. In this case, the Board chose the third course of action, without affording petitioner any opportunity for further hearing or argument. The nature and extent of the Board's deliberations are not known.

On October 22, 1957, the full Board issued its findings and recommendations and filed a final certified report of the proceedings with the Clerk of the Supreme Court of Ohio. R. 12-14. The findings and recommendations were prefaced by the Statement (R. 12) that this matter had come on for consideration by the Board "on the pleadings, the transcript of the proceedings before the Hearing Panel, the exhibits the briefs of counsel, and on the Hearing Panel's findings of fact and recommendations." The Board thereupon made its own findings which, in substance, supported the original charges. No mention was made, however, of any facts in relation to the additional charge concerning the issuance of a subpoena in the Chappel traffic case.

The Board's determination was that petitioner was guilty of misconduct as defined in Section 5 of Rule XXVII.[2] The recommendation was that petitioner "should be suspended for an indefinite period from the practice of law pursuant to Section 6(b) of Rule XXVII on Disciplinary Procedure of the Supreme Court of Ohio." R. 13-14.

Thereafter, on November 12, 1957, petitioner filed in the Supreme Court of Ohio objections to the full Board's findings and recommendations. R. 15-16. Among those objections was the claim (R. 15) that Rule XXVII was "unconstitutional and void because it violates due process in that it does not guarantee to respondent a hearing before this Court."[3] It was also claimed that the Board erred in attempting to review judicial discretionary acts of the petitioner (R. 16).

Briefs were submitted to the Supreme Court of Ohio and oral argument was held on these objections before that tribunal. This hearing occurred only because the Supreme Court, in its discretion, requested

[2] Section 5 defines misconduct to mean "any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by this Court from time to time, or the commission or conviction of a crime involving moral turpitude."

[3] This contention was advanced in terms of the due process clause of the Fourteenth Amendment of the Federal Constitution. Thus at pp. 10-11 of his brief in support of the objections, petitioner averred that "To deprive a duly admitted attorney of law of his valuable right of his license to practice law without a hearing, [before the Supreme Court], we submit, violates the due process and equal protection of the laws—clauses of the Fourteenth Amendment to the Constitution of the United States."

it pursuant to Section 19 of Rule XXVII.[1] Because of the failure of the full Board to make any mention of the Chappel case subpoena incident and because the respondent Bar Association took no exception to that failure, the briefs and arguments before the Supreme Court made no mention of that incident.

The Supreme Court of Ohio confirmed the report of the full Board of Commissioners and ordered that the petitioner be indefinitely suspended from the practice of law and his name was ordered stricken from the Journal and the Roll of Attorneys kept by the Clerk of that Court. R. 503-530; Appendix hereto, pp. 1a-25a, *infra*. In the course of its opinion, the Supreme Court dismissed petitioner's contention that the absence of a hearing before the Supreme Court deprived him of due process of law as guaranteed by the Constitution of the United States by ruling that "the fact that respondent [petitioner] had a hearing before this court precludes him from questioning the constitutionality of a rule which has not operated unconstitutionally upon him." R. 506; Appendix hereto, p. 4a, *infra*.

The Supreme Court also discussed at length the Chappel case incident and relied upon it in reaching its judgment. The court remarked that "the facts regarding this episode disclose a judge more interested in obtaining personal publicity at the expense of someone else's reputation, by capitalizing on a newsworthy issue, than one truly interested in the efficient dispensing of justice." R. 525; Appendix hereto, p. 21a, *infra*. No mention was made of the fact that this

[1] Section 19 of Rule XXVII provides in pertinent part that "after hearing, *if requested by this Court*, this Court shall enter such order upon the matter as it may find proper . . ." [Emphasis added.]

incident was omitted from the findings of the Board of Commissioners. The Supreme Court, in addition, overruled the contention that it was improper to inquire into petitioner's acts of judicial discretion by holding that petitioner had abused the meaning of the term "judicial discretion" by directing the exercise of such discretion toward the furtherance of his general political ambitions rather than to the administration of impartial justice.

A timely application for rehearing was denied on July 2, 1958. R. 3. Objection was made in that application (R. 544) to the Supreme Court's consideration of the Chappel case subpoena incident in light of the failure of the Board of Commissioners to make findings thereon. Objection was also made in the application (R. 536-540) to the *ex post facto* applications of Rule XXVII to events occuring prior to the adoption of that rule, citing Article 1, Section 10, of the Federal Constitution.

On September 3, 1958, Mr. Justice Burton extended the time in which to file this petition for a writ of certiorari to and including October 30, 1958.

REASONS FOR GRANTING THE WRIT

1. Rule XXVII of the Supreme Court of Ohio, Applied Below so as to Destroy the Availability of the Findings of the Three-Member Panel That Conducted the Hearing, Raises a Procedural Due Process Question Under the Fourteenth Amendment That Is Both Important and Novel

It is concededly not the function of this Court to sit in judgment on the merits of petitioner's ouster from the bar of Ohio. *Theard* v. *United States*, 354 U.S. 278, 281 (1957); *Selling* v. *Radford*, 243 U.S. 43, 50 (1917). The creation and application of standards

relative to the admission to, or suspension from, the practice of law before the courts of a particular state are matters peculiarly within the exclusive realm of state power.

At the same time, however, a state cannot so exercise this great power in "an arbitrary or discriminatory manner." *Konigsberg* v. *State Bar*, 353 U.S. 252, 273 (1957). "A State cannot exclude a person from the practice of law or from any other occupation in a manner that contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-9 (1957). Thus this Court has recognized that a state court judgment of disbarment must be accorded conclusive effect as regards suspension from the state bar unless it appears "from an intrinsic consideration of the state record" that "the state procedure, from want of notice or opportunity to be heard, was wanting in due process." *Selling* v. *Radford*, *supra*, 51. See also *In re Noell*, 93 F. 2d 5 (C.A. 8, 1937).[5]

In this case, petitioner made a timely challenge in federal due process terms to the disbarment procedure established by Rule XXVII of the Supreme Court of Ohio. He objected that Rule XXVII violated due process in its failure to guarantee him a hearing before the Supreme Court. The court's answer was that he was precluded from raising such an issue since he had in fact had a hearing before that tribunal.

[5] In the *Noell* case, the court made "an intrinsic examination of the procedure followed by the state court" and concluded "the requirements of due process" had not been adequately met in the disbarment proceedings in the Missouri courts since the St. Louis Court of Appeals "at no time afforded the respondent an opportunity to be heard before it upon the merits of the controversy which it alone had power to determine."

But no amount of briefing or oral argument before the Supreme Court of Ohio could provide the full *de novo* hearing, with examination and cross-examination of witnesses, which was essential if the due process defect of Rule XXVII was to be overcome.[6] That defect was written into the Rule itself and the unfair procedure thereby established was applied to and imposed upon the petitioner in this instance. And it was a defect which prevented a full and fair record from being available to the Supreme Court of Ohio when it considered petitioner's objections to the findings and recommendations of the full seventeen-man Board of Commissioners on Grievances and Discipline.

It was constitutionally proper, of course, for the Supreme Court of Ohio to delegate to the Board of Commissioners its powers to provide notice and a hearing, to take evidence, to make findings of fact and to formulate recommendations as to discipline. *McVicar v. State Board of Law Examiners*, 6 F. 2d 33 (D. C. Wash., 1925); *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928); *In re Kenner*, 178 La. 774, 152 So. 520 (1934); *In re Hadwinger*, 167 Okla. 307, 27 P. 2d 604 (1933). Such delegation is simply an application of the time-honored, judicial practice of referring fact-finding tasks to masters or referees. The Supreme Court itself, by virtue of Rule XXVII, retains the power to

[6] Moreover, the hearing provided by the Supreme Court was granted in its discretion and not as a matter of right. See footnote 4, *supra*. This Court has held that "extra-official or casual notice, or a hearing granted as a matter of favor or discretion, [cannot] be deemed a substantial substitute for the due process of law that the Constitution requires. . . . This notice [and hearing] must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915).

review the proceedings before the Board of Commissioners and to make all ultimate determinations.

Petitioner asserts, however, that Rule XXVII is constitutionally defective in its explicit failure to provide that the factual findings and the recommendations of those who actually conducted the hearing be made available both to the petitioner and to the Supreme Court of Ohio. Under Rule XXVII, the following procedural events occurred with reference to those findings and recommendations:

(1) The panel of three Commissioners who conducted the hearing was required to and did make findings of fact and recommendations. Section 13 of Rule XXVII. These findings and recommendations were never made available to the petitioner and are not part of the record in this case.

(2) The panel's findings and recommendations apparently were reported to the full Board of Commissioners, as required by Section 13 of Rule XXVII.

(3) The full seventeen-member Board of Commissioners issued entirely separate and distinct findings and recommendations of its own, prefacing them with the statement that the matter came on for consideration "on the pleadings, the transcript of the proceedings before the Hearing Panel, the exhibits, the briefs of counsel, and on the Hearing Panel's findings of fact and recommendations." R. 12; Section 14 of Rule XXVII.

(4) The full Board's findings and recommendations were then certified and reported to the Supreme Court of Ohio. Those were the only findings and recommendations which that Supreme Court had before it in making the final resolution of the disbar-

ment issues. Nothing in Rule XXVII requires or even permits the transmittal of the Hearing Panel's findings and recommendations to the Supreme Court.

It is thus apparent that the Rule XXVII procedure resulted in substituting the findings of the full seventeen-man Board of Commissioners for those of the three-man Hearing Panel. This substitution process was so secret and uncontrolled that neither the petitioner nor the Supreme Court of Ohio can at any point determine the nature, content or unanimity of the findings and recommendations of the Hearing Panel. No one can say on the basis of the record whether the Hearing Panel made certain findings favorable to the petitioner or whether the Board of Commissioners altered, omitted or overruled any such favorable findings. Nor can it be determined whether one of the Hearing Panel members may have dissented in favor of the petitioner.[7]

The importance of the original, undiluted findings and impressions of the three Commissioners who attended the hearing and saw the witnesses is plainly evident. The evidence here was far more than documentary in nature. There were many witnesses. And there were sharp conflicts in their testimony on various critical points. Their credibility, or lack of it, be-

[7] In *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 139 (1947), this Court pointed out that where one of three judges of a court did not participate in a decision "we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they the benefit of the views and conclusions of the third judge. And *should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed.*" (Emphasis added)

came of paramount significance in resolving these factual disputes. The impressions created by the petitioner's own testimony, for example, were largely decisive of the weight to be given to his protestations of judicial discretion in defense against certain alleged wrong-doings.

Thus the opinions and impressions of those who personally heard and saw the witnesses while testifying became of critical significance in the fair formulation of the ultimate findings and conclusions by the Supreme Court of Ohio. "[W]here weight and credibility [are] given to testimony of witnesses, the litigants are entitled to have the person who conducts the hearing and sees the witnesses to at least have his conclusions and impressions reported to the fact-finding body." *Radaca* v. *United States Smelting Co.*, 62 Ariz. 464, 470, 158 P. 2d 540, 542 (1945). As has been said by an outstanding authority on administrative law and procedure, "whenever the demeanor of witnesses is a substantial factor, making a decision without having a report from the hearing officer is undesirable and in some cases may be deemed by the reviewing court a denial of a fair hearing." Davis, Administrative Law, § 102, p. 339 (1951).

In short, due process of law in this context requires an affirmative showing "that the one who finds the facts had access to the benefit of [the] findings, conclusions and impressions" of "the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying." *Crow* v. *Industrial Commission*, 104 Utah 333, 336, 140 P. 2d 321, 322 (1943).[8]

[8] In *Farran* v. *Curtis Pub. Co.*, 276 Pa. 553, 120 A. 544 (1923), it was said: "When facts are required to be found . . . it is especially advisable that the commissioner who presides at the

He who hears need not necessarily decide but if he does decide then the one who makes the ultimate determinations must have the benefit of that decision. Cf. *United States* v. *Morgan*, 298 U.S. 468, 481 (1936).

It is true, of course, that due process under the Federal Constitution does not necessarily require that the judge or court rendering the ultimate findings and conclusions actually see and hear the witnesses testify and observe their demeanor. *Geo. S. Bush & Co.* v. *United States*, 135 F. Supp. 696, 707 (Cust. Ct., 1949).[9] Nor does due process forbid a tribunal from hearing a cause on a transcript of evidence taken earlier before another court or judge. *De La Rama* v. *De La Rama*, 241 U.S. 154, 158-159 (1916).

And so in this case it would not have been constitutionally wrong for Rule XXVII to have provided that the Hearing Panel Commissioners shall issue no findings or recommendations and that the Supreme Court shall determine the matter solely on the basis of the written record. But that is not to say that a requirement, such as contained in Rule XXVII, that those who actually hear the evidence must issue findings and recommendations may be applied in an unfair or discriminatory manner. See *Griffin* v. *Illi-*

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hearing and sees the witnesses and hears them testify should find the facts. He is much better fitted to give proper effect to the testimony than one who has before him merely the typewritten copy of the evidence." See also *United States* v. *Nugent*, 100 F. 2d 215, 217 (C.A. 6, 1938); *United States ex rel. Ohm* v. *Perkins*, 79 F. 2d 533 (C.A. 2, 1935).

[9] See also *S. J. Charia & Co.* v. *United States*, 43 C.C.P.A. Customs 147, 151-152 (1956). Cf. *United States* v. *Nugent*, 100 F. 2d 215, 217 (C.A. 6, 1938).

nois, 351 U.S. 12, 18 (1955).[10] Findings by the Hearing Panel Commissioners having been made an integral part of Ohio disbarment proceedings, the due process clause of the Federal Constitution requires that those findings—in the context of a factually-disputed case—be made available to the ultimate fact-finding tribunal so that the petitioner will not be unfairly deprived of whatever benefits such findings might contain.

Here the record and Rule XXVII demonstrate that the Supreme Court of Ohio—the tribunal that made the ultimate findings and conclusions[11]—did not have access to the findings and recommendations of the Hearing Panel of three Commissioners who were the only ones to hear and observe the witnesses and who were required to make such findings and recommendations. The availability of those findings and recommendations was destroyed by Rule XXVII in its substitution of the findings of the seventeen-man Board (fourteen of whom had never seen or heard the witnesses) for the findings of the three-man Hearing Panel. That substitution made the task of the Supreme Court more

[10] In the *Griffin* case it was said: "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

[11] The fact-finding function of the Supreme Court is dramatically illustrated by its findings and discussion of the Chappel case subpoena incident. That incident was not the subject of any of the findings of the full Board of Commissioners, yet the Supreme Court felt itself free to make its own findings in that respect despite the fact that petitioner was misled by the Board's findings into the belief that the Chappel case incident was no longer in issue.

hazardous and its conclusions less trustworthy. The court was forced to guess from the written record as to the credibility to be attached to the oral testimony of the witnesses; it had no way whatever of knowing the impact of such testimony on those who actually heard it. And the petitioner was effectively deprived of the benefit of any favorable findings or impressions that the Hearing Panel might have expressed, or that a possible dissenting Commissioner might have voiced.[12]

Thus a procedural due process question of great importance is raised by the ruling below. It is important not only to the petitioner in his struggle to preserve his professional career but to the development of the due process concepts of the Fourteenth Amendment. The right to a full and fair hearing and determination, particularly as to one's privilege to remain a member of the legal profession, is too valuable a right to permit either subtle or crude erosions. Rule XXVII of the Supreme Court of Ohio represents a subtle erosion of that right. As such, it deserves full review and consideration by this Court.

Moreover, Rule XXVII represents a new and growing trend in the technique of state disbarment procedures. Disbarment proceedings are occurring with increasing frequency. The problem raised by Rule XXVII is therefore of a recurring nature, one that needs definitive resolution by this Court so that the unfairness that may adhere to the procedure may be

[12] Conceivably, the Hearing Panel made findings as to the Chappel case incident that favored petitioner, thereby influencing the full Board to disregard the matter. Had the Supreme Court of Ohio had the benefit of such Hearing Panel findings its treatment of the matter and possibly its determination of the penalty to be imposed might have been different.

eradicated before more individuals suffer the ill-effects of that unfairness. The absence of any prior ruling by this Court on this matter augments the need and desirability of the grant of certiorari in this case.

2. The Decision Below, Rendered Pursuant to Rule XXVII Without Benefit of the Findings of Those Who Heard and Saw the Witnesses, is in Direct Conflict With the Principle Established in Crow v. Industrial Commission, 104 Utah 333, and Radaca v. United States Smelting Co., 62 Ariz. 464

Highlighting the appropriateness of the grant of certiorari in this case is the fact that the decision below, grounded on the procedure created by Rule XXVII, directly conflicts with the due process principle that the one who makes the ultimate determination of the facts must have access to the findings and recommendations of the one who conducted the hearing, heard the testimony and saw the witnesses while testifying. That principle has been most fully developed by the Supreme Courts of Utah and Arizona in the respective cases of *Crow* v. *Industrial Commission*, 104 Utah 333, 140 P. 2d 321 (1943), and *Radaca* v. *United States Smelting Co.*, 62 Ariz. 464, 158 P. 2d 540 (1945). And a well-recognized basis for the grant of certiorari is a conflict over federal constitutional issues as between the highest courts of different states.[13]

In the *Crow* case, the one Commissioner who heard the evidence and saw the demeanor of the witnesses

[13] See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, § 371, p. 738 (Wolfson and Kurland ed., 1951); Stern and Gressman, Supreme Court Practice, p. 141 (2d ed., 1954). An example of a grant of certiorari on this basis is to be found in *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 52 (1937).

while testifying did not participate in the decision of the Commission and he made no findings which made his opinion of the evidence available to the Commission in making its decision. The evidence was sharply contradictory and much depended upon the credibility of the witnesses. The Utah Supreme Court reversed the Commission's determination on due process grounds and held that (104 Utah at 337, 140 P. 2d at 322):

> "Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying, whether a member of the board, or an examiner or referee, must either participate in the decision, or where, at the time the decision is rendered, he has severed his connections with the board, commission or fact finding body, the record must show affirmatively that the one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony, by either written or oral reports thereof. This does not necessarily require that all of the commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result, but his opinion on the testimony must be available to the commission in making its decision. . . ."

Chief Justice Wolfe, concurring specially in the result, added (104 Utah at 345, 140 P. 2d at 326):

> "What is required to satisfy the demands of due process, that is, of a full or fair hearing, is that he who observes the witness and listens to the evidence must transmit his observations or conclusions to those others who, whether they are

superiors or associate members of the same agency, are to decide and this may be done in the form of tentative findings or by a report or recommendations or orally in conference."

In the *Radaca* case, the Arizona Supreme Court held that, while the demands of due process had been satisfied in the particular proceeding before it (62 Ariz. at 470, 158 P. 2d at 542),

> ". . . a fair and full hearing to litigants under the due process clause of the constitution requires that the examiner or referee who hears the evidence, where there is a sharp conflict in the testimony, must in some way participate in the decision or give his conclusions and impressions of such testimony by either written or oral reports. The basis for this is that where weight and credibility is given to testimony of witnesses, the litigants are entitled to have the person who conducts the hearing and sees the witnesses to at least have his conclusions and impressions reported to the fact-finding body. If a situation should arise where it could not be assumed that the observations and conclusions of the examiner had been communicated to the commission, and the evidence was in such conflict that the weight and credibility to be given testimony of the various witnesses was the determining factor, the due process rule might have to be applied."

The conflict between the two foregoing cases and the instant one is clear. Here the tribunal which ultimately determined the facts and imposed the penalty was deprived of the impressions and conclusions of the only three Commissioners who actually heard the witnesses. That deprivation was no less complete because the three Hearing Panel Commissioners also participated in the findings of the full

Board. There is nothing to indicate that the full Board's findings were identical with those of the Hearing Panel. For aught that appears, the fourteen members of the Board who did not participate in the hearing may have insisted that significant alterations, omissions or additions be made in the Hearing Panel's findings; or entirely new and different ones may have been written.

In any event, the Supreme Court of Ohio was effectively denied the benefit of the undiluted findings of the Hearing Panel by operation of Rule XXVII. In that denial lies the clear conflict with the principle enunciated in the *Crow* and *Radaca* cases.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

Respectfully submitted

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

EUGENE GREEN
JOSEPH SCHIAVONI
Youngstown Terminal Bldg.
Youngstown, Ohio

Counsel for Petitioner

October 28, 1958.

APPENDIX

THE SUPREME COURT OF OHIO

MAHONING COUNTY BAR ASSOCIATION *v.* FRANKO.

Attorneys at law—Admission to practice—Exclusive jurisdiction of Supreme Court—"Legal profession" construed—Disciplinary power of Supreme Court—May prescribe rules of procedure—Rule XXVII provides procedure—Disciplining of judges as members of legal profession—Canons of Judicial Ethics basis for disciplining judges—Judges running for nonjudicial office without resigning judicial position—Subject to disciplinary action—Breach of Canon 30 of Judicial Ethics

1. The Supreme Court of Ohio has inherent exclusive jurisdiction over the admission to the practice of law in Ohio. (Rule XIV, Rules of Practice of the Supreme Court of Ohio.)

2. The legal profession of Ohio includes every person who has been admitted to the practice of law in this state, by and under the rules for admittance thereto as adopted by the Supreme Court of Ohio, whose name is maintained on the Roll of Attorneys kept by such court, regardless of the subsequent capacity or status of such person.

3. The Supreme Court of Ohio has inherent jurisdiction over proceedings relating to the disciplining of members of the legal profession of this state, resulting from the Supreme Court's organization as such as well as from its inherent exclusive power of admission, and it may provide by rule both the basis for and the procedure to be followed with reference to such disciplining. (Paragraph one of the syllabus of *In re Thatcher*, 80 Ohio St., 492, and *Cleveland Bar Association* v. *Pleasant*, 167 Ohio St., 325, approved and followed.)

4. Rule XXVII of the Rules of Practice of the Supreme Court of Ohio provides a comprehensive procedure to

activate the inherent duty and to implement the inherent power of that court to supervise the disciplining of members of the legal profession of Ohio.

5. Judges who are required by statute to be attorneys at law must necessarily maintain their status as members of the legal profession, and the Supreme Court of Ohio, by virtue of its inherent power with reference to the disciplining of members of such profession, may provide by rule the basis for and the procedure to be followed in the disciplining of such members who hold judicial positions.

6. The Canons of Judicial Ethics, as adopted by and made a rule of the Supreme Court of Ohio, provide a basis for the disciplining of members of the legal profession who hold judicial positions, and a breach thereof subjects such a member of the legal profession to disciplinary action according to the procedure set out in Rule XXVII of such court.

7. A member of the legal profession who is a judge is subject to disciplinary action when he becomes a candidate for a nonjudicial office and does not resign his judicial position, thereby committing a breach of that part of Canon 30 of the Canons of Judicial Ethics, as adopted by this court, which provides that "if a judge should decide to become a candidate for any office not judicial he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."

(D. D. No. 3—Decided May 28, 1958.)

On Certified Report by the Board of Commissioners on Grievances and Discipline.

This is a disciplinary proceeding arising under and by virtue of Rules XXVII and XXVIII of the Rules of Practice of the Supreme Court of Ohio (see statement of facts

in *Cleveland Bar Association* v. *Pleasant*, 167 Ohio St., 325, regarding the reason for and purpose of Rule XXVII), wherein the respondent, Judge Frank R. Franko, is alleged to be subject to discipline by virtue of his breach of one or more of the Canons of Judicial Ethics duly adopted by this court and made a part of Rule XXVIII in 1954.

Upon complaint being made according to the procedure outlined in Rule XXVII, a panel of three commissioners was appointed by the Chairman of the Board of Commissioners on Grievances and Discipline, pursuant to the provisions of Rule XXVII, Section 10, and a hearing was had during which the relator, the Mahoning County Bar Association, and the respondent presented evidence.

Subsequent to such hearing, it was the finding of the board of commissioners that the respondent was guilty of a violation of the Canons of Judicial Ethics adopted by this court, and that discipline is merited. It is the board's recommendation that respondent be suspended.

To this report and recommendation respondent duly filed his objections, pursuant to the provisions of Rule XXVII, Section 17, and a hearing was had before this court.

Further facts will be stated hereinafter.

Mr. John H. Ranz and *Mr. William E. Pfau, Jr.*, for relator.

Messrs. Green, Schiavoni & Anderson and *Messrs. Gorman, Davis & Hengelbok*, for respondent.

OPINION, per MATTHIAS, J.

MATTHIAS, J. Respondent's objections to the report and recommendation of the Board of Commissioners on Grievances and Discipline raise essentially three issues for our determination:

I. Whether this court has jurisdiction to discipline an attorney who is a judge for acts committed in his judicial

capacity which are in violation of the Canons of Judicial Ethics adopted by and made a rule of this court subsequent to the commission of such acts.

II. Whether the facts in the instant case justify a finding that such Canons of Judicial Ethics have been violated.

III. Whether the measure of discipline recommended by the board of commissioners is commensurate with such violation or violations, if such are found to exist.

Respondent also questions the constitutionality of Rule XXVII of the Supreme Court of Ohio, on the grounds that "it violates due process in that it does not guarantee • • • [him] a hearing before this court," that "it is at variance with statutory procedure," and that "it deprives the Court of Common Pleas and Court of Appeals jurisdiction over disbarment proceedings, which jurisdiction is vested in said courts by the General Assembly."

With respect to "due process," the fact that respondent had a hearing before this court precludes him from questioning the constitutionality of a rule which has not operated unconstitutionally upon him. In this respect, the law applied by this court to statutes applies with equal force to the rule of court here under consideration. That law is set out in the first and second paragraphs of the syllabus of *State, ex rel. Herbert*, v. *Ferguson, Aud.*, 142 Ohio St., 496, 52 N. E. (2d), 980.

The latter two contentions with respect to constitutionality were argued extensively, considered, and rejected by this court in *Cleveland Bar Association* v. *Pleasant*, *supra* (167 Ohio St., 325).

In considering the first of the above-stated issues to be determined herein, our research has disclosed many instances wherein courts throughout the nation have dealt, or attempted to deal, with alleged misconduct of judges. The results of such actions have been diversified and varied. See annotation, 53 A. L. R. (2d), 305, and the cases cited

therein. Our research has failed, however, to disclose any instance wherein the highest appellate court of any state has dealt directly with the question at hand in a setting such as we have in Ohio, that is, where such court has provided by rule a comprehensive procedure to activate its inherent duty and to implement its inherent power with respect to supervising the disciplining of all members of the legal profession in the state.

In this respect, however, see *In re Copland*, 66 Ohio App., 304, 33 N. E. (2d), 857, wherein the Court of Appeals for Cuyahoga County sustained the disbarment by the Common Pleas Court of Cuyahoga County of one David Copland, who, at the time of the action, was a judge of the Municipal Court. Copland was charged with writing and causing to be published in a legal journal an opinion in a fictitious cause purporting to have been heard and decided by him, and with the giving of false answers concerning his background and education in a campaign questionnaire sent him by the Cleveland Bar Association.

Copland readily admitted both charges but argued that the acts stated therein did not subject him to discipline since they were not committed "in office," that is, as an attorney at law, but were acts committed in his capacity as Judge of the Municipal Court. However, in sustaining the judgment of disbarment rendered by the Common Pleas Court on the above facts, the Court of Appeals said:

"We perceive no special sanctity which should surround the unofficial acts of a judge. It is not the personal habits of a judge that are complained of with respect to his judgeship, but his act done *as a member of the Bar under color of his other office which he holds for the time being.*" (Emphasis added.)

Thus, even though Copland's acts were found to have been committed outside his capacity as a judge, the disbarment of a judge for ethical reasons is not entirely new to the state, although it *is* new to this court.

In considering the jurisdiction of this court to discipline an attorney who is a judge for acts committed in his judicial capacity and which are in violation of the Canons of Judicial Ethics adopted by and made a rule of this court, we must keep in mind the basic facts and premises upon which our conclusion will rest.

1. "The Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the bar." Paragraph one of the syllabus of *In re Thatcher*, 80 Ohio St., 492, 89 N. E., 39. "The Supreme Court of Ohio has inherent power as to the disciplining of attorneys admitted to practice in this state and may provide by rule the procedure with reference to such disciplining." Paragraph one of the syllabus of *Cleveland Bar Association* v. *Pleasant, supra.*

2. In 1952, the Supreme Court of Ohio adopted the Canons of Professional Ethics which it declared "shall be binding upon all members admitted to practice law in the state of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment." See Rule XXVIII, Rules of Practice of the Supreme Court of Ohio.

3. In 1954, the Supreme Court of Ohio amended and adopted the Canons of Judicial Ethics which it also declared "shall be binding upon all members admitted to practice law in the state of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment." See Rule XXVIII, Rules of Practice of the Supreme Court of Ohio.

4. In 1956, the Supreme Court of Ohio amended Rule XXVII, effective January 1, 1957, to provide a comprehensive procedure to activate the inherent duty and to implement the inherent power of that court to supervise the disciplining of all members of the legal profession of the state.

Rule XXVII, Section 1, as amended, empowers the Board of Commissioners on Grievances and Discipline, created therein, to act "(a) concerning complaints of misconduct as hereinafter defined [in Section 5] which are alleged to have been committed by any attorney or counselor at law *or judge*, or (b) concerning practices of any attorney and counselor at law *or judge*, which tend to defeat the administration of justice or to bring the *courts or the legal profession* into disrepute."

Rule XXVII, Section 5, as amended, provides that "*misconduct*, as the term is used herein, *shall mean* any violation of any provision of the oath of office taken upon admission to [the] practice of law in this state, or *any violation of* the Canons of Professional Ethics or *the Canons of Judicial Ethics as adopted by the court* from time to time, or the commission or conviction of a crime involving moral turpitude."

Rule XXVII, Section 6, as amended, provides:

"*Each* attorney and counselor at law or *judge found guilty of misconduct shall be disciplined.* The discipline of such persons shall be

"(a) a permanent disbarment from the practice of law, or

"(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

"(c) a public reprimand, or

"(d) a private reprimand." (Emphasis added.)

5. The General Assembly has declared that, as a prerequisite to serving as a judge of any court in the state of Ohio, a person must be an attorney who has been admitted to the practice of law in Ohio for a specified number of years. See Sections 2503.01 (judges of the Supreme Court), 2501.02 (judges of Courts of Appeals), 2301.01

(judges of Common Pleas Courts), 2101.02 (judges of Probate Courts), 1901.06 (judges of Municipal Courts) and 1907.051 (judges of County Courts), Revised Code. The fact that this requirement is not effective until 1963 with respect to judges of County Courts does not detract in the least from the clear intent of the General Assembly that, as soon as possible, every judge in this state shall have been admitted to the practice of law for a specified number of years in order to be eligible to hold such office.

So much has been said and written about the honor, dignity, duties, responsibilities and standard of conduct generally expected of the legal profession that to expound thereon here would only be to repeat that which has already been well said many times. The fact remains, however, that a person who attains the honor and dignity of being a member of the legal profession necessarily renders himself subject to the duties and responsibilities thereof, *i. e.*, one who is admitted to the practice of law in Ohio by meeting the character and educational requirements prescribed by the rules of this court must, in order to continue the practice of law in this state, meet and maintain the standard of ethical conduct which is also prescribed by the rules of this court. The Supreme Court of Ohio, a part of the "judicial branch" of the governmental structure of Ohio, demands that persons admitted to the practice of law in this state must maintain a high degree of integrity and an exceptionally high standard of conduct. This court is not hesitant to discipline persons admitted to the practice of law who fail or refuse to maintain such standards. It follows that those outside the "judicial branch" of our governmental structure also have a right to expect much in the way of integrity and the maintenance of an exceptionally high standard of conduct from one who has been admitted to the practice of law by this court.

It is for this reason that the requirement by the "legislative branch" of our government that all judges of the

state shall be attorneys who have been admitted to the practice of law for a specified number of years can lead only to the conclusion that the General Assembly demands that the judges of the state shall not only have met the standards of character and knowledge of the law required by this court for *admittance* to the practice of law, but that they shall also have maintained, for a specified number of years, *and must continue to maintain* the high ethical standard of conduct required by this court. It follows that the requirement by the Supreme Court of Ohio that attorneys who are judges shall adhere to a specialized code of ethics, *i. e.*, the Canons of *Judicial* Ethics, is in accord with the legislative intent that the judges of this state shall be persons who must adhere to the highest possible standard of ethical conduct.

In addition, it is fundamental that the legal profession of Ohio includes every person who has been admitted to the practice of law therein, by and under the rules for admittance thereto as adopted by this court, whose name is maintained on the Journal and Roll of Attorneys kept by this court, regardless of the subsequent capacity or status of such person, be he banker, farmer, businessman or judge. Stated more simply, the legal profession of Ohio includes every person who has the *privilege*, granted by this court, to represent himself to the public as an attorney at law and to appear in a representative capacity before the courts of this state. It is the privilege to practice law before the courts of Ohio which is determinative of one's status as a member of the legal profession of this state, rather than the exercise of such privilege. It follows, of course, that one who does not have the privilege to practice law in this state is not a member of the legal profession thereof.

Since a judge is required by statute to be an attorney at law, it is clear that he must necessarily maintain his *privilege* to practice law, *i. e.*, his membership in the legal

profession, even though ethical standards or the public interest may require a temporary limitation on or suspension of his ability to exercise such privilege without resigning his judicial office.

We conclude, with respect to the first issue presented, that since an attorney at law does not, upon assuming a judicial position, cease to be a member of the legal profession, but becomes such a member who has assumed a position of public trust which demands of him an even greater degree of responsibility and an even higher and more specialized standard of conduct than that demanded of a practicing attorney, this court, through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member for acts committed in his judicial capacity which are in violation of the Canons of Judicial Ethics adopted by and made a rule of this court prior to the commission of such acts.

We will next consider the second issue presented by respondent's objections.

It is clear from the undisputed facts that respondent did wilfully and knowingly violate Canon 30 of the Canons of Judicial Ethics adopted by this court in 1954. That canon specifically provides that, "if a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."

Respondent argues that there could be no violation of Canon 30, since that canon conflicts with the law of Ohio as set forth by this court in *Fulton* v. *Smith*, 99 Ohio St., 230, 124 N. E., 188, and is, therefore, unenforcible.

In the *Fulton case*, this court decided that, since Section 14, Article IV of the Constitution of Ohio, provides only

that votes cast for Common Pleas Court and Supreme Court judges for other than judicial offices shall not be counted, the General Assembly may not enlarge upon that prohibition in providing by statute that votes cast for probate judges for nonjudicial offices shall not be counted.

It is at once apparent that a finding by this court regarding the power of the General Assembly to enlarge upon a prohibition imposed by the Constitution is in no way connected with the power of this court to impose certain standards of conduct upon all members of the legal profession of this state as conditions to the maintenance of their status as such members.

Section 14, Article IV of the Constitution, was enacted in 1851, many years before the General Assembly, in 1917, first saw fit to require that a candidate for judicial office must be an attorney at law. It applies to the disposition of votes cast in an election—a subject which is political in nature and concerning which this court admittedly has no power to make rules. It became effective long before the first set of nationally recognized Canons of Judicial Ethics (those adopted by the American Bar Association in 1924) was promulgated.

It is our conclusion regarding this issue that the *Fulton case* involved solely a ruling by this court on the validity of a statute considered in relation to a constitutional provision, and that that case has no application whatsoever to the question before us. The fact that respondent relied on that case in arriving at his decision to disregard Canon 30 helps explain his reason for such disregard but does not excuse the fact that he intentionally and wilfully violated a rule duly adopted by this court, to which he was subject by virtue of his status as a member of the legal profession.

We come now to the last and perhaps most difficult issue raised, *i. e.*, whether the discipline of suspension, recommended by the board of commissioners, is commensurate with the violation found.

Canon 30 of the Canons of Judicial Ethics, as adopted by and made a rule of this court, provides:

"A candidate for judicial position should not make or suffer others to make for him promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

"While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign *in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.*

"If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is *using the power of his judicial position to promote his candidacy or the success of his party.*

"He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion." (Emphasis added.)

The emphasized portions of that canon clearly indicate the reasons for the restrictions therein on partisan political activities by members of the judiciary. The purpose of such restrictions is to keep judges ever mindful that, even though they may have been nominated in a partisan primary and may have been connected to some extent with partisan politics during their campaign for election (though elected on a nonpartisan ballot), once elected to the judiciary they have assumed an office of public trust which

must remain outside and distinct from the "mainstream" of partisan politics in order to maintain the independence, impartiality and freedom from bias, prejudice and pressure, which the people have a right to expect from their judges.

It is thus apparent that the requirements of Canon 30 that a judge who becomes a candidate for a nonjudicial office shall resign his judicial position and that a judge who is a candidate for a judicial office must exercise caution in engaging in partisan activities are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the state of Ohio shall be kept as far as possible from the "mainstream" of partisan politics, all things considered, and that the resignation of a judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling.*

The respondent herein did not resign his judicial position while a candidate for prosecuting attorney. Although this fact standing alone might not warrant the discipline of suspension, we must look further and determine whether he not only committed a breach of Canon 30 by his failure to resign, but whether his offense was more serious in that he did in fact *use* the power and prestige of his judicial position to further his candidacy for a nonjudicial office.

A clear picture of respondent's attitude and activities (A) prior to becoming a judge, (B) during his campaign for judge, (C) while a judge of the Youngstown Municipal Court and (D) during his campaign for prosecuting attorney is presented by the record in this case, and such a

pict ure is certainly pertinent to the inquiry at hand, *i. e.*, to the degree of discipline merited by respondent's violation.

(A)

Although there was absolutely nothing unethical about respondent's decision, while an assistant city prosecutor, to embark upon a political career, his following testimony, on cross-examination, is highly significant in interpreting his later actions and in determining the basic motivation therefor:

"Q. Judge Franko, when did you decide to make politics your career? A. After serving, oh, I would say three or four years in the office of the prosecutor of the city of Youngstown, Ohio.

"Q. So it is fair to say, is it, that *when you were campaigning for the office of municipal judge in the fall of 1953, you had set out upon a course to make politics your career?* A. I would say, *yes*." (Emphasis added.)

(B)

In the questioning of the respondent about a letter which he used in his campaign for prosecuting attorney (which will be more thoroughly discussed later), which letter was introduced as exhibit 2 in the instant proceeding, the following testimony was adduced:

"Q. Yes. In relator's exhibit No. 2, Judge Franko, you stated this, didn't you: 'I believe today that my policy of not marking driver licenses for trivial traffic offenses and of scaling fines to meet the seriousness of the offense carry out the ideals I promised to uphold?' You said that, didn't you? A. I did.

"*Q. And the ideals to which you refer in that sentence were the ideals which you espoused in your campaign for municipal judge in 1953, weren't they? A. That is correct. I ran on those—on that ideal.*

"Q. So that it was more or less a *part of your platform* in the fall of 1953 when you were campaigning for municipal judge that you would not follow the provisions strictly of Revised Code Section 4507.15 with respect to marking drivers' licenses, but you would use your discretion; isn't that so? A. I interpreted this law as not being a mandatory provision and I—I felt I had the right to use my judicial discretion and I would do so; put it that way, Mr. Ranz.

* * * *

"Q. All right. So that in your campaign for municipal judge in 1953 you told the voters that you interpreted that statute as being discretionary? A. The statute was never mentioned. The campaign was—the letter around January of 1953 was a very general one. * * *" (Emphasis added.)

The court can but note that the general public has a distinct aversion to being cited for and found guilty of traffic violations and to having such convictions noted on their driver licenses. With this fact and the foregoing testimony in mind, we call attention to that part of Canon 30 which states:

"A candidate for judicial position should not make * * promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support."

(C)

Rather than to detail the extensive testimony of respondent regarding his various actions as a judge of the Youngstown Municipal Court of which complaint is made and which related to his use of the power and prestige of his judicial position, suffice it to say that the testimony of respondent supports the following facts:

1. The respondent, immediately upon his induction as a judge of the Youngstown Municipal Court, commenced and continued a practice of accepting pleas of guilty on traffic matters on Saturday mornings, regardless of the facts that he was not the regularly assigned traffic judge, and that Saturday was not a day upon which traffic or any other matters of the court were ordinarily heard, and in the face of and over the strenuous objections of the judge who *was* regularly assigned to hear traffic cases.

2. The respondent commenced and continued to assess, during the "self-assigned" hearings noted above and during his regularly assigned period of hearing traffic cases, a more or less standard penalty of five dollars and costs suspended for all traffic violations; he commenced and continued a policy of refusing to mark the convictions of traffic law violators on their driver licenses; and he commenced and continued a policy of voiding duly issued parking violation tickets, to the extent of at least 720 in seven months, for no valid reason whatsoever.

3. The respondent took full advantage of the fact that the presence in Florida of a certain policeman, Sergeant William Davis, had been widely publicized by a Youngstown newspaper (the publicity strongly inferred that misfeasance or nonfeasance was involved in such presence in Florida) by issuing a subpoena for said policeman and continuing the trial of an alleged traffic law violator from hour to hour and from day to day for over two days, publicly anticipating the return of the police officer from Florida in response to the summons. The quite adequate and, we feel, anticipated newspaper coverage of these events kept respondent's name in a prominent place throughout the episode.

Respondent's answer to the complaints based upon the above facts was similar in nature in each instance and might be summarized as the statement, "I exercised my

judicial discretion in each instance, and my exercise of such discretion cannot be questioned."

Although it is quite true that a mere mistake in the exercise of judicial discretion by a judge is not and should never be the cause or subject of a disciplinary proceeding under the Canons of Judicial Ethics prescribed by this court, we must call attention to the fact that not everything a judge does in connection with his judgship can be said to be an exercise of his "judicial discretion."

With respect to the first fact noted above, concerning respondent's holding of "self-assigned Saturday court," even though he was not assigned to hear traffic cases and in the face of the objections of his fellow judge *who was* regularly assigned to hear such cases, we call attention to Sections 1901.15 and 1901.16, Revised Code, which read in part as follows:

Section 1901.15. "In addition to the exercise of all the powers of a municipal judge, the presiding municipal judge or chief justice has the general supervision of the business of the court *and may classify and distribute among the judges the business pending in the court.* * * *" (Emphasis added.)

Section 1901.16. "When a Municipal Court consists of more than one judge:

* * * *

"(B) Any order made by the presiding judge * * * under the special powers conferred upon him may be vacated, amended, or modified *by the vote of a majority of the judges of the court.*

"(C) The administrative authority vested in judges constituting a Municipal Court shall be exercised *by a majority vote of such judges*, including the presiding judge * * *" (Emphasis added.)

The reason for these provisions is apparent. In any multijudge court, there is a problem of administration both as to the internal functions of the court and as to the division of duties and responsibilities of the judges thereof. Section 1901.15 simply gives the presiding judge of a multijudge Municipal Court a prima facie duty to assume the responsibility for such administration, and Section 1901.16 simply makes his acts subject to the approval of the majority of the judges of that court.

It is clear that these statutes create a "little democracy" in a multijudge Municipal Court *so far as administrative matters are concerned.* Administrative matters, especially with respect to a division of the workload of a court, rarely, if ever, involve the exercise of judicial discretion within the normal meaning of that term, and it is the duty of each judge of such a multijudge Municipal Court to abide by the decision of the presiding judge or the majority with respect to such matters.

As pointed out in Canon 2 of the Canons of Judicial Ethics adopted by this court, courts, generally speaking, are for litigants and not litigants for the courts. Although the independence of judicial conscience is sacrosanct in our judicial structure, the litigants of our courts have a right to expect a smooth-running operation in a multijudge court, and it is intolerable that the terms, "judicial discretion" and "judicial conscience," should be used as excuses for one judge of a multijudge court to disrupt and throw out of gear a schedule of assignment of duties agreed upon by a majority of the judges of such a multijudge court.

We can but conclude, with respect to the issue at hand, that respondent's persistent and continued disregard of the "order of business" for conducting the Youngstown Municipal Court, especially in the face of active objection to his so doing, did not involve any "judicial discretion" whatsoever and resulted only in creating confusion and antagonism within the court—a situation which could op-

erate only to the detriment of the effective administration of justice to the litigants for whom that court exists.

As to respondent's standard fine of five dollars and costs suspended for unaggravated traffic violations, as classified by him to mean those in which there was no accident or wantonness involved, as to his avowed policy of not marking driver licenses and as to his extremely benevolent attitude toward recipients of parking tickets, suffice it to say that, although this court quite possibly could not quarrel with his exercise of judicial discretion in an isolated instance, the facts set out can lead us only to the conclusion that as a general rule the exercise of his judicial discretion by respondent was not nearly so much directed to the administration of impartial justice as it was to "winning friends and influencing people" in the furtherance of his general political ambitions.

In connection with this, we call attention to that paragraph of Canon 21 of the Canons of Judicial Ethics which reads:

"In imposing sentence he [a judge] should endeavor to conform to a reasonable standard of punishment *and should not seek popularity or publicity either by exceptional severity or undue leniency.*" (Emphasis added.)

Although we must agree with respondent's statement to the effect that everything printed in a newspaper may not be accepted as pure fact, we are forced to conclude that the Youngstown newspaper drew a highly accurate conclusion when (in the words of respondent) "they said that I—that my exercising of judicial discretion created a breakdown in the traffic enforcement policy of this community."

With respect to respondent's issuance of a summons for William Davis, the sergeant on the Youngstown police force, referred to above, the record shows that, at a time shortly prior to the arraignment of one George Chappel on a charge of reckless operation of a motor vehicle, the

local newspaper had widely publicized the fact that Sergeant Davis was in Florida with his ailing wife when, as stated in the newspaper, he should have been on duty in Youngstown. Upon his appearance before respondent, Chappel pleaded not guilty, and respondent then proceeded *sua sponte* to issue a subpoena for Sergeant Davis, admittedly knowing that the sergeant was in Florida, allegedly to question him about certain matters of police routine. Subsequent to his issuance of such subpoena, respondent continued the Chappel hearing "four or five times," in the words of one witness, over a period of two days, publicizing the fact that he was giving Sergeant Davis ample time to fly back to Youngstown in order to appear before him in court.

The prosecutor handling the Chappel case testified as follows with regard to this episode:

"Q. Throughout these various continuances of this Chappel hearing, isn't it a fact that one or more of the Youngstown Vindicator police reporters were usually present? A. That is true.

"Q. And isn't it a fact that there was a good deal of publicity about this in the Vindicator during the time of the continuances of these hearings? A. That's true."

Although we admit that there is nothing inherently wrong in continuing the trial of a cause from time to time in order to make available witnesses necessary to a determination of the issues, Sergeant Davis was neither the arresting officer in the Chappel case nor a witness to the alleged violation. From his testimony, it seems that respondent wished to question the sergeant about routine police procedure concerning the citation of persons for traffic violations when the officer issuing the citation did not actually witness the violation. It is clear that, if there was a defect in the procedure of bringing Chappel before the court, that defect could have been judicially determined as a fact

without the necessity of Sergeant Davis' presence and aside from any question of what "standard operating procedure" had been followed generally by the Youngstown police department.

We are forced to conclude that the facts regarding this episode disclose a judge more interested in obtaining personal publicity at the expense of someone else's reputation by capitalizing on a newsworthy issue, than one truly interested in the efficient dispensing of justice.

(D)

The actions of respondent with respect to his campaign for prosecuting attorney, which are alleged to show that he used the power and prestige of his judicial position to promote his own candidacy, are essentially threefold:

1. He assembled and had published and distributed some 85,000 copies of a four-page standard-size newspaper, entitled "The Political News," in which he caused himself to be referred to as "Judge Franko" innumerable times.

2. He wrote letters requesting support in his campaign for prosecuting attorney to both Democrats and Republicans, addressing the former as "Dear Fellow Democrat" and the latter as "Dear Fellow Republican," in which letters he did not hesitate to call attention to his judicial position.

To the Democrats he wrote:

"How many times, for instance, has the present prosecutor opened his door to Democratic Party workers? Isn't it true that, in contrast, you know Judge Franko as a man who has been liberal and humane to the petition of all Democrats."

And to the Republicans he wrote:

"But it's certainly well known that as a Republican-elected judge, I have been foremost among constructive

critics of the present city administration and have been waging a crusade against the racket-infested * * * gang which now controls a large segment of our country government." That letter was signed, "Your friend and co-worker, Judge Frank R. Franko."

It is here noted that respondent was, in fact, nominated and elected to the Youngstown Municipal Court as a Republican, but that he subsequently repudiated his Republican affiliation and declared himself to be a Democrat.

3. He wrote a letter to substantially all who appeared before him in traffic matters, calling their attention to the fact that "I believe today that my policy of not marking driver licenses for trivial traffic offenses and of scaling fines to meet the seriousness of the offense carry out the ideals I promised to uphold."

The first and second activities set out above (the "newspaper" and the letters to both Democrats and Republicans) clearly involved the use of the power and prestige of respondent's judicial position to promote his own candidacy for a nonjudicial office. The letters to both Democrats and Republicans also raise a serious question as to whether respondent even knows the meaning of the word, "ethics," let alone the term, "judicial ethics." To attempt to woo support from those outside one's own political party can hardly be called reprehensible conduct, nor can the "straddling of a political fence" be termed reprehensible, however offensive it may be to some people. However, to claim to members of both major political parties that one is a member of and sympathetic to the cause of each is not only reprehensible conduct, but strongly indicates that the candidate so acting has not even a rudimentary knowledge of any ethical standard whatsoever.

The wording of the letter last referred to above (the letter to those who had appeared before him in traffic matters) certainly gives meaning to respondent's policy of

not marking driver licenses, his standard fine of five dollars and costs suspended and his benevolent attitude toward recipients of parking tickets. The wording of this letter clearly supports our first conclusion that respondent's exercise of judicial discretion was not nearly so much directed to the conscientious administration of justice as it was for the purpose of advancing respondent's political career, pursuant to the decision he made while an assistant city prosecutor.

It was substantially upon the facts set out herein that the Board of Commissioners on Grievances and Discipline recommended that respondent's license as an attorney at law be suspended according to the provisions of Rule XXVII, Section 6, Rules of Practice of the Supreme Court of Ohio.

Suspension is a drastic form of discipline under the rules of this court, and we are not unaware of the difficulties attendant to reinstatement, including the repassage of the Bar examination, which make suspension almost tantamount to disbarment. It is apparent that such a severe discipline as suspension or disbarment should not lightly be imposed. Due consideration should be given to honest mistakes or misapprehensions of law.

Giving respondent the benefit of each of the above considerations, however, we can conclude only that the facts herein set out clearly indicate that respondent committed much more than a breach of Canon 30, through error in judgment or misapprehension of the law, and that his entire course of conduct both prior to and during his campaign for a nonjudicial office was in direct and unexcusable violation of the very ethical foundation upon which the admonition to resign rests. In clear terms, his decision to make a career of politics made while an assistant city attorney, his appeal to the cupidity and prejudices of the electorate in his campaign for municipal judge, his continual disruption, upon election, of the orderly administra-

tion of the business of the Youngstown Municipal Court in order to carry out his campaign promises, his blatant play for popularity in imposing extremely light sentences for traffic offenses, his abuse of the meaning of the term, "judicial discretion," to justify these and other acts which were also incidental to the carrying out of his campaign promises, his capitalization, by the use of the power and prestige of his judicial position, on every opportunity to seek favorable newspaper publicity and the continuous reference in his campaign literature for prosecuting attorney to his lenient policies as a judge compel the conclusion that his every act subsequent to his decision to make politics his career was in furtherance of this general political ambition, and that *his primary consideration as a judge of the Youngstown Municipal Court was the use of the power and prestige of that office to further and promote his candidacy for any office for which he might later choose to run, whether judicial or nonjudicial.*

We are frank to state that had a case arisen involving a breach of Canon 30, caused solely by a misconception of the application of *Kelton* v. *Smith*, *supra* (99 Ohio St. 230), to Canon 30, we might well have been inclined toward leniency prior to a clarification of the issue by this court. However, the facts of the instant case clearly indicate either that respondent has little or no concept whatsoever of the ethical behavior expected and demanded of a member of the legal profession, or that, having such concept, he thinks so little of its value that he disregards it completely. Either attitude toward ethics from an attorney at law undeniably would be reprehensible—from an attorney at law who has assumed a judgeship it is inexcusable. Thus, we conclude that the discipline of indefinite suspension recommended by the Board of Commissioners on Grievances and Discipline is commensurate with respondent's violation of the Canons of Judicial Ethics.

Accordingly, respondent is suspended indefinitely, and it is ordered that his name be stricken from the Journal and the Roll of Attorneys kept and maintained by the Clerk of the Supreme Court of Ohio; that the respondent cease, desist and refrain from the practice of law in any way or form whatsoever from this day hence; and that respondent be denied each, any and all of the rights, privileges and prerogatives ordinarily accorded to a member in good standing of the legal profession of Ohio.

Report confirmed and judgment accordingly.

Wiggandt, C. J., Zimmerman, Stewart, Taft, Bell and Hennart, JJ., concur.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 475

FRANK R. FRANKO,
Petitioner,

vs.

MAHONING COUNTY BAR ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of Ohio

JOHN H. RANZ,
1106 Union National Bank Building,
Youngstown, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—W. 10, 1958

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Opposing counsel have accurately and ably stated all of the facts essential to a fair consideration of his case and we, therefore, proceed directly to a discussion of the law.

PETITIONER WAS ACCORDED DUE PROCESS OF LAW IN EVERY RESPECT.

Petitioner concedes that it was not essential that the Supreme Court of Ohio actually conduct the trial of his case and that it was perfectly proper for it to assign this task to a Panel of three of its seventeen member Board of Commissioners on Grievances and Discipline. His only complaint is that the findings and recommendations of the three member Panel which were reviewed and acted upon by the entire Board were not made available either to him or to the Supreme Court of Ohio. We submit that his contention is utterly without merit.

There is no question but that the report of the Panel was considered by the full seventeen member Board. Indeed, the Panel itself was a part and parcel of that Board and the impressions which its members obtained in conducting the trial and listening to the witnesses were most certainly fully discussed during the Board's deliberations. And it had before it the transcript of all of the testimony as well.

The Petitioner further concedes that due process does not require that a court see and hear the witnesses and that many cases are tried wholly on depositions or on a transcript of the testimony taken at a former trial. The cases of *Crow v. Industrial Commission*, 104 Utah 333, 140 Pac. 2nd 321 (1943) and *Radaca v. United States Smelting Company*, 62 Arizona 464, 158 Pac. 2nd 540 (1945) upon which he relies simply hold that those who are required to find the ultimate facts should have the benefit of the impressions gained by those who saw and heard the witnesses. And this is exactly what happened in Petitioner's case. Certainly due process does not require that the Supreme Court of Ohio should have been the finders of the ultimate facts. The Interstate Commerce Commission and many other federal commissions and innumerable commissions of the various states are constantly conducting hearings and making ultimate findings of facts and their right to do so has been established beyond question.

Moreover, there was little or no conflict in the evidence as to Petitioner's misconduct. He concededly did not resign his judicial position while campaigning for the office of Prosecuting Attorney of Mahoning County, Ohio; he concededly did not note the pleas of guilt on drivers' licenses as he was required to do by statute; he never, at any time, denied the fact that during his campaign for Prosecuting Attorney he voided over seven hundred park-

ing violation tickets; he admitted that he had voided ten such tickets of his own and, he, himself, testified that in a traffic violation case (the George Chappel case) he issued a subpoena for a police officer whom he knew to be in Florida and whose presence could not possibly have been obtained by such subpoena. Thus, the finders of the facts were not even required to resolve any conflicting testimony.

We submit, therefore, that the Petitioner's misconduct was clearly established by his own testimony and we further submit that even though it might be said that the evidence of his misconduct was in conflict, he was nevertheless afforded the full protection guaranteed to him by the due process of law clause of the Federal Constitution. The seventeen member Board of Commissioners, in their deliberations, had the full benefit of listening to the comments and views of the three members of their Board who had conducted the trial and who had heard the witnesses. And the Supreme Court of Ohio, in reviewing and affirming the Board's recommendation, had before it a transcript of all the testimony. Surely, such a procedure afforded to Petitioner every constitutional protection contemplated by the Fourteenth Amendment.

Respectfully submitted,

JOHN H. RANZ,
1106 Union National Bank Building,
Youngstown, Ohio,
Counsel for Respondent.